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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 1010 61

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, and DAN H. WHEELER, DIRECTOR OF THE BITUMINOUS COAL DIVISION OF THE DEPARTMENT OF THE INTERIOR,

Petitioners,

v.

ASSOCIATED INDUSTRIES OF NEW YORK STATE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

PAGE

Opinion Below 1

Question Presented 1

Statement 2

Conclusion 9

CITATIONS.

Federal Communications Commission v. Sanders Bros. Radio Station, 309 U. S. 470 7

Federal Communications Commission v. National Broadcasting Company Inc. (KOA) et al.—U. S. —No. 585, October Term, 1942, decided May 17, 1943 7

STATUTES.

Bituminous Coal Act of 1937

Section 4II(e) 6

Section 6(b) 1, 4, 5

Federal Communications Act of 1934 ..... 2, 7

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Opinion Below

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 134 F. (2) 694.

Question Presented

The question presented on this petition for a writ of certiorari is whether the court below correctly held that under the provisions of Section 6(b) of the Bituminous

Coal Act of 1937, as amended (herein for convenience sometimes called the "Coal Act")[1], Respondent (petitioner below) is a "person aggrieved" by the orders issued by the Petitioners dated August 28 and September 30, 1942, which increased in the amount of 20¢ per ton minimum prices for bituminous coal payable by Respondent's members and which orders were issued in a proceeding to which Respondent was a party, so that Respondent may obtain a review of such orders in the Circuit Court of Appeals for the Second Circuit where Respondent resides and has its principal place of business.

Statement

Respondent recognizes that the question presented is one of public importance, especially if the Coal Act is extended by Congress without change in its present provisions beyond the expiration date, August 23, 1943.[2] Respondent also concedes that it may be desirable to have the question finally disposed of prior to a consideration of the petition for review upon the merits.

It is the position of the Respondent, however, that the determination of the question, as made in the court below, was in all respects correct and that there is no necessity for a further review of the question by this Court, since, as we shall show, the determination below appears to accord with the recent rulings of this Court in analogous situations arising under the review provisions of the Federal Communications Act of 1934.[3]

In the proceedings instituted by Petitioner Wheeler and his predecessor (designated General Docket No. 21),

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[1] 15 U. S. C., Sec. 836 (b); 50 Stat. 85.

[2] See Joint Resolution to extend the provisions of the Bituminous Coal Act of 1937 for a period of ninety days, Public Law 53—78th Cong., Ch. 97, First Sess., H. J. Res. 122, approved May 21, 1943.

[3] 47 U. S. C. Sec. 301, *et seq.*

which resulted in the issuance of the orders under review, a copy of the published notice of hearing in the proceeding was served upon Respondent's counsel. Thereupon, Respondent, as an interested party, duly appeared in the proceeding and became a party thereto without objection. In connection with its appearance, Respondent filed, as a part of the record, a complete list of Respondent's members consisting of 1,356 persons, firms and corporations engaged in commerce and industry in the State of New York and who purchase and consume substantial quantities (estimated at approximately 15,000,000 tons for the year 1942) of bituminous coal produced in Minimum Price Area 1, as defined in the Coal Act (R. 1 and R. 15).[4]

Respondent actively participated as a party in the proceedings before Petitioners. Its counsel cross-examined witnesses, filed motions, objections and exceptions, submitted written briefs and presented oral arguments before the Trial Examiner who heard the proceedings in General Docket No. 21 and before Petitioner Wheeler. The Trial Examiner and the Petitioners made numerous rulings which expressly referred to matters urged by Respondent's counsel (R. 3, 37).

Respondent's counsel urged before the Petitioners, among other things, that orders dated August 28 and September 30, 1942, made in such proceeding, increasing minimum prices, were not made in accordance with the provisions of the Coal Act; that the Petitioners exceeded the powers conferred by the Coal Act, and that the orders were made upon findings which were contrary to the evidence and which were not supported by substantial evidence

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[4] Besides Respondent, numerous other associations, representatives of consumers and producers of coal, appeared in the proceeding without objection, including, among others, Association of American Railroads; National Coal Association; United Mine Workers of America; American Coal Distributors Association; National Association of Hothouse Vegetable Growers of America; Ohio Hothouse Cooperative Association; Cleveland Vegetable Growers Cooperative Association; Toledo Hothouse Growers Association; Ashtabula Growers Association and Marion County Greenhouse Association (see Stenographic Minutes of hearing in General Docket No. 21, pages 5107-9).

(R. 3, 4, 6, 11, 12, 13 and 14). Respondent's objections and exceptions to findings and conclusions made by the Trial Examiner and by Petitioner Wheeler were overruled in large part.

Respondent also filed a petition addressed to Petitioner Ickes to review the order of Petitioner Wheeler and upon such review to stay the same. However, such petition was denied and the order of Petitioner Wheeler was affirmed by Petitioner Ickes (R. 14).

On October 27, 1942, Respondent, as petitioner, filed its petition in the Circuit Court of Appeals for the Second Circuit to review the orders of the Respondents Wheeler and Ickes dated, respectively, August 28 and September 30, 1942.[3]

Petitioners moved to dismiss the Respondent's petition for review of the orders increasing minimum prices on the ground that Respondent is not a "person aggrieved" by the orders within the meaning of Section 6(b) of the Coal Act and lacked standing to maintain a petition for review and that the court was without jurisdiction of the petition (R. 34, 35). After a full oral argument and the submission of printed briefs, the motion was denied by an order dated March 3, 1943 made by Swan, Augustus N. Hand and Frank, Circuit Judges (R. 60). The opinion of the court by Frank, C. J., was filed February 8, 1943 and is printed at R. 36 to 59.

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[3] Prior to the filing of the petition for review, by letter dated October 16, 1942, Respondent made inquiry of the office of the Consumers' Counsel whether that office "will undertake to obtain a judicial review of the said orders". By letter dated November 3, 1942, six days after the time within which Respondent was advised the petition for review should be filed, Luther Harr, Consumers' Counsel, replied, saying, among other things: "We did not reply to you sooner because in our judgment the period of sixty days fixed by the statute ran from the date of the Secretary's [Ickes'] order rather than from the date of the Director's order, so that we did not feel that a decision was necessary prior to November 29. We are giving careful consideration to your petition and are studying the question of intervention and possible participation in the court proceeding. We have not come to a definite conclusion on this question, but we shall keep in touch with you from time to time." The Consumers' Counsel did not intervene and did not take any proceedings to review the Petitioner's orders.

POINT I

The Respondent is an "aggrieved person" within the meaning of Section 6(b) of the Coal Act and therefore has a valid standing to maintain the petition for review and the Court below has jurisdiction of the petition for review.

It is conceded by Petitioners that the orders of August 28 and September 30, 1942, increasing minimum prices, are reviewable orders.

To make certain that Petitioners' orders would have the force of law, compliance with the provisions of Section 2(a) of the Act was required. That provision reads as follows:

> "* * * No order which is subject to judicial review under section 6, and no rule or regulation which has the force and effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. Such findings, if supported by substantial evidence shall be conclusive upon review thereof by any court of the United States."[6]

Within the foregoing provision Respondent was an "interested party" and, as such, it became a party to the proceeding in which the orders under review were issued.

The provisions of Section 6(b) of the Act pursuant to which the petition for review was filed read as follows:

> "(b) Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States

[6] 15 U. S. C. Sec. 829(a).

> Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."[7]

In the petition for review the Respondent alleged, among other things, that its members are consumers of bituminous coal and purchase and consume substantial quantities (estimated to be approximately 15,000,000 tons for the year 1942) of bituminous coal; that such coal has been and is being sold to Respondent's members at not less than minimum prices established by the Petitioners; that the orders dated August 28 and September 30, 1942 made by the Petitioners are prejudicial to the Respondent and its members, in that they require Respondent and its members to purchase and pay for bituminous coal produced in Minimum Price Area 1 (as defined in the Act) at increased minimum prices and at prices related to such increased prices which have not been determined according to law (R. 4 and 14).

The Coal Act expressly provides in Section 4II(e) that:

> "No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission, and the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code * * *.

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[7] 15 U. S. C. Sec. 836(b).

"The making of a contract for the sale of coal at a price below the minimum or above the maximum therefor established by the Commission at the time of the making of the contract shall constitute a violation of the code, *and such contract shall be invalid and unenforceable.*" (Italics supplied.)[8]

Thus it cannot be doubted that, as a party to the proceeding which resulted in the issuance of the orders sought to be reviewed, Respondent adequately established that Respondent and its members have suffered and will continue to suffer economic injury by such orders so that Respondent has a standing to present the question of the validity of the orders by appeal, that is, by petition for review in a Circuit Court of Appeals.

In analogous situations arising under the provisions of the Federal Communications Act of 1934[9] this Court appears to have settled the rule that a showing of economic injury by a party to a proceeding before an administrative agency which has issued an order causing such injury gives such party a standing to present the question of the public interest in the validity of such order by an appeal from (i. e., court review of) the order of the administrative agency.

Federal Communications Commission v. *Sanders Bros. Radio Station,* 309 U. S. 470;

Federal Communications Commission v. *National Broadcasting Company, Inc.* (KOA) *et al.,*— U. S.,—No. 585, October Term, 1942, decided May 17, 1943.

In the *National Broadcasting Company* case, *supra,* it was said in the opinion of this Court:

"SECOND. While the Commission did not urge before the court below, and did not advance as a reason for the grant of certiorari, that respondent was not entitled to appeal to the Court of Appeals, this matter

[8] 15 U. S. C. Sec. 833 (e).

[9] 47 U. S. C., Sec. 301, *et seq.*

was argued here and, as it raises a question of jurisdiction, we shall consider it.

"It would be anomalous if one entitled to be heard before the Commission should be denied the right of appeal from an order made without hearing. We think the Act does not preclude such an appeal. Section 402(b) (2) permits an appeal to the Court of Appeals of the District of Columbia by 'any * * * person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing' any application for modification of an existing station license. If, within the intent of the statute, the interests of KOA would be adversely affected, or if KOA would be aggrieved by granting the application of WHDH, then the statute grants KOA a right of appeal.

"In *Federal Communications Commission* v. *Sanders Bros. Radio Station,* 309 U. S. 470, we dealt with a similar situation. There the question was whether a rival station, which would suffer economic injury by the grant of a license to another station, had standing to appeal under the terms of the Act. We held that it had. We pointed out that while a station license was not a property right, and while the Commission was not bound to give controlling weight to economic injury to an existing station consequent upon the issuance of a license to another station, yet economic injury gave the existing station standing to present questions of public interest and convenience by appeal from the order of the Commission. Here KOA, while not alleging economic injury, does allege that its license ought not to be modified because such action would cause electrical interference which would be detrimental to the public interest.

"In view of the fact that §312(b) grants KOA the right to become a party to the proceedings, we think it plain that it is a party aggrieved, or a party whose interests will be adversely affected by the grant of WHDH's application, as, indeed the Commission seems to have thought when it first noticed WHDH's application for hearing. We, therefore, hold KOA was entitled to appeal from the Commission's action in excluding it from participation in the proceeding and from the order made by the Commission.

"The judgment is affirmed."

It is respectfully submitted that the decision below is fully in accord with the recent ruling of this Court on the precise question raised by Petitioners on this application and that there is, therefore, no necessity for the granting of the writ of certiorari to review the decision below.

CONCLUSION

For the reasons stated, therefore, it is respectfully requested that the petition for a writ of certiorari be denied.

June, 1943.

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